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In the Supreme Court of the United States

OCTOBER TERM, 1951

No.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

ARTHUR WINER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered on February 26, 1952 (R. A. 46),[1] denying enforce-

[1] For purposes of this petition, the printed record before this Court consists of two separately paginated volumes: the appendix to respondent's brief in the Court below, herein designated "R.A.," and the appendix to the Board's brief in the court below, designated "B.A." The proceedings in the court below are bound with, and paginated continuously from, the end of the appendix to respondent's brief.

ment of an order issued by the Board against Arthur Winer, Inc. (B. A. 45-48).

OPINIONS BELOW

The opinion of the Court of Appeals (R. A. 36-44) is reported at 194 F. 2d 370. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 15-33, 42-48) are reported at 94 NLRB 651.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1952 (R. A. 46). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

The president of the company and the supervisor in charge of the sewing room questioned various employees as to whether they had received notices of a union meeting, whether a union organizer had called at their homes, whether they planned to attend a union meeting, what the union had to offer, and "what was going on" which caused "them" to send out cards that "they" were holding meetings. On the day of the first union meeting, the supervisor asked an employee to "find out what is going on, what they are offering," and subsequently asked for, and obtained, the names of those attending the meeting and a report on the

matters there discussed. The questions presented are:

1. Whether the Board could properly hold that these acts of interrogation and surveillance constituted interference, restraint, or coercion in violation of the right of employees "to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. Whether the Board could properly attribute the acts of the supervisor, who was in charge of the employees in question, to the corporate employer.[2]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29

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[2] We do not ask this Court to review the question whether substantial evidence supports the Board's finding that respondent discriminatorily discharged Helen Little and Hazel Munyon for union activities. However, because the disposition of Little's case by the court below rested in part upon its disposition of the questions stated above, we request that if certiorari is granted and the decision of the court below is reversed, the question of the validity of the Board's findings as to Little be remanded to the court below for further consideration in the light of this Court's opinion. Since the ruling of the court below as to Munyon did not, unlike Little's case, depend in part upon the court's views on the questions stated above, we seek no such reservation as to Munyon. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 490-491.

U. S. C., Supp. IV, 141, *et seq.*), are set forth in Appendix B, *infra,* pp. 28-31.

STATEMENT

Following the usual proceedings under Section 10 of the Act, the Board, on May 18, 1951, issued its findings of fact, conclusions of law, and order (B. A. 15-33, 42-48). The facts as found by the trial examiner and the Board, and accepted by the court below,[3] may be summarized as follows:

The events herein described occurred during August and September, 1949, at a time when the Amalgamated Clothing Workers of America, C.I.O., herein called the Union, was attempting to organize the employees of respondent, a Gary, Indiana, manufacturer of men's trousers (B. A. 8, 12, 65-66). As soon as Arthur Winer, respondent's president, heard "that there was some activities going on around the shop . . . they were sending out cards that they were holding

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[3] The court below stated (R. A. 38): "While we seriously question whether there was sufficient evidence to sustain many of the findings of the trial examiner and the Board on the question of coercion, we are of the opinion that the facts found, if accepted as true, fall far short of justifying the conclusions of the trial examiner and the Board that the respondent's actions constituted such interference, restraint, and coercion of its employees as is prohibited by Section 8 (a) (1) of the Act." The facts set forth in the following Statement rest largely upon uncontradicted testimony, much of it that of respondent's witnesses. Where the facts stated are in dispute, the conflicting testimony is discussed in footnotes; see notes 5 and 7, *infra.*

meetings," he summoned at least three employees to his office and questioned them separately as to the "dissatisfaction" of which he had heard (B. A. 50-52; 112). In the course of these conversations, Winer, after telling one of the employees that he had heard that the union representative had been at her house, inquired what the union had to offer (B. A. 18; 53). Although the employee in question had already joined the union, she told her employer that the union had nothing to offer "that we didn't have already" (B. A. 58).

Although Winer himself did not further pursue his inquiry into the union's organizational activities, Supervisor Anne Winkler, who was in charge of the ninety employees in the sewing department, displayed an active interest in the union's affairs and, in Winer's absence, reported the information she obtained to Winer's administrative assistant (B. A. 59, 96, 97, 107-111; R. A. 17-18). Winkler admitted asking several employees whether they had received letters from the union, whether they were going to the union meeting, and what benefit they would derive from the union (B. A. 109-111).[4]

Winkler's primary source of information about the union's activities was an employee named Anne Kusmierz. It was Kusmierz who first told

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[4] Winkler also said she "might have" inquired of an employee whether a union organizer had been at the employee's house (B. A. 110).

Winkler that the union was becoming active, and who later told Winkler that she (Kusmierz) had received a letter inviting her to come to a union meeting (B. A. 97, 102). At that time Winkler asked who else had received such letters, and Kusmierz supplied her with several names (B. A. 102-103). On September 6, 1949, the day of the first union meeting especially devoted to organizing the Winer plant, Winkler asked Kusmierz if she planned to attend the meeting (B. A. 104). According to Kusmierz' testimony, credited by the trial examiner and the Board, Winkler told Kusmierz that if she attended the meeting, she should "find out what is going on, what they are offering, things like that," and call Winkler after the meeting (B. A. 20-21, 42; 71-72).[5] After the meeting Kusmierz, who had "asked more questions than anybody" there (B. A. 83, R. A. 42), telephoned Winkler and, in response to Winkler's questions, told her what the union organizer had said and what questions the employees had asked (B. A. 73, 106-107).[6] Winkler also asked

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[5] Winkler admitted inquiring whether Kusmierz was going to attend the meeting, but did not remember that she asked Kusmierz to find out what was going on and to call her after the meeting (B. A. 105). As noted above, the trial examiner and the Board credited Kusmierz (B. A. 20-21, 42).

[6] The first question asked, "Will we get fired if we join the union?", was asked by employee Van Meter, who had previously been subjected to Winer's interrogation (B. A. 52, 68).

Kusmierz to name the employees attending the meeting, and Kusmierz thereupon named at least ten employees (B. A. 73-74, 107-108). According to Kusmierz' testimony, credited by the trial examiner and the Board, Winkler concluded the conversation by telling Kusmierz not to come to Winkler's desk the next day "because the girls will be sort of suspicious of what is going on" (B. A. 20; 73-74).[7]

Upon the foregoing facts, the trial examiner and the Board found that respondent, acting through its president and through a top-rank supervisor, had engaged in surveillance over the union meeting, and had interrogated its employees as to the nature and progress of union activities at the plant, their reaction to the union, whether they planned to attend union meetings, and what benefit they expected to receive from the union (B. A. 18-21, 42-43). The trial examiner and the Board concluded that by this conduct respondent violated Section 8 (a) (1) of the Act in that it interfered with, restrained, or coerced its employees in the exercise of their right, guaranteed in Section 7, to self-organization, to form labor organizations,

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[7] Winkler admitted the entire conversation testified to by Kusmierz except for two minor items: (1) she denied telling Kusmierz that she (Winkler) had been trying to reach Kusmierz by telephone before Kusmierz telephoned her; (2) she denied telling Kusmierz not to come past the desk or that "the girls will be suspicious about the meeting" (B. A. 106, 109; cf. B. A. 73, 74). As noted above, the trial examiner and the Board credited Kusmierz (B. A. 20, 42).

to join or assist the union, and to engage in other concerted activities for the purpose of mutual aid or protection (B. A. 18-21, 33, 42, 45).

Respondent discharged two employees, Helen Little and Hazel Munyon, following their attendance at the union meeting. Winkler's interrogation revealed Little's interest in the union, and, as the Board found, respondent thereupon revived a three-month old episode of a damaged machine to justify her discharge (B. A. 81-82, 111, 139-140, 147). Similarly, the Board found that after Winkler's interrogation disclosed that Munyon attended the union meeting, respondent suddenly acceded to her foreman's year-old request that she be replaced by a man (B. A. 91, 108, 116, 119). The trial examiner and the Board rejected respondent's explanations, and found that the employee's union activity was the motivating cause of each discharge (B. A. 22-31, 43-45).

Upon the above findings, the Board, adopting the recommendations of the trial examiner, ordered respondent to cease and desist from the unfair labor practices found or from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act, to reinstate Little and Munyon with back pay, and to post appropriate notices (B. A. 33-36, 45-48).

The court below set aside the order of the Board (R. A. 36-44). It held that in the absence of any

anti-union background or pattern of conduct hostile to unions, the mere interrogation of employees as to their union activities, unaccompanied by any threat or promise of benefits, does not violate the Act (R. A. 37-39). With respect to surveillance, the court noted that "Winkler's request for and acceptance of a report on the union meeting * * * in itself contained neither a threat nor a promise," that the record does not establish that "Winkler's inquiry resulted from any plan or program of the respondent," and that "so far as the record shows Winkler was motivated only by her own curiosity" (R. A. 39-40).[8]

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[8] The court below also held that the evidence did not sustain the Board's finding of unlawful discrimination against employees Munyon and Little (R. A. 41-44). With respect to Little, the court noted, among other things, that although "she did attend the union meeting and asked questions . . ., Anne Kusmierz, an employee who was not discharged, asked more questions than any of the other girls at the meeting" (R. A. 42). The court appears to have ignored Kusmierz' role as Winkler's primary source of information about the union. The court concluded as to Little that the finding that Little was discharged because of her union activity [depended] . . . on a record or a pattern of anti-union hostility which, as we held above, did not exist" (R. A. 43). As noted above (p. 3, n. 2), should this Court grant certiorari and reverse the court below as to the illegality of respondent's interrogation and surveillance, we request the case be remanded for reconsideration of Little's discharge in the light of the "record or pattern of anti-union hostility" shown by those violations of Section 8 (a) (1).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in holding:

1. That the acts of interrogation and surveillance found by the Board to constitute interference, restraint, or coercion, did not violate Section 8 (a) (1) of the Act.

2. That the corporate employer was not responsible for the acts of a major supervisor which the Board found interfered with, restrained, or coerced the employees.

3. That paragraph 1 (b) of the Board's order should be set aside.

REASONS FOR GRANTING THE WRIT

The holding of the court below that respondent's president and the supervisor of its sewing room were free to interrogate employees as to their union activities and other matters pertaining to union organization, and to engage in surveillance of a union meeting through the medium of an employee "stool pigeon," is in sharp conflict with the Board's uniform construction of the statute and raises a question of fundamental and ever-recurring importance under the Act.

Ever since *Pennsylvania Greyhound Lines,* 1 NLRB 1, 18-22, enforced, 303 U. S. 261, the Board has consistently held that an employer's surveillance of union activities and interrogation of employees as to their union activities or other union affairs constitute forms of interference, restraint, or coercion which violate Section

8 (a) (1). Recently, in *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358, 1359-1363, the Board restated in detail its reasons for condemning such interrogation and surveillance, *per se*, as an unfair labor practice.[9] Briefly stated, the Board believes that by surveillance and questioning the employer seriously impairs the statutory privilege of employees to maintain privacy about their union affairs. Moreover, the Board believes that the necessary effect of interrogation, like that of open surveillance, is to "restrain" or "coerce" employees; the employee who is observed or questioned by his employer "is reasonably led to believe that his employer not only wants information on the nature and extent of his union interests and activities but also contemplates some form of reprisal once the information is obtained" (85 NLRB 1361). Drawing upon its own experience in administering the Act over a period of fourteen years, the Board has said: "Experience demonstrates that the fear of subsequent discrimination which interrogation instills in the minds of employees is reasonable and well-founded" (*id.*, at 1362). The Board concluded (*Ibid.*):

> In prohibiting interrogation, therefore, we are not only preserving the employees' right to privacy in their union affairs; we are not

[9] For the convenience of the Court we have reprinted the pertinent portion of this decision as Appendix A, *infra*, pp. 18-28.

> only removing a subtle but effective psychological restraint on employees' concerted activities; but we are also seeking to prevent the commission of the further unfair labor practice of discrimination by condemning one of the first steps leading to such discrimination.[10]

To protect "the right of employees to organize for mutual aid without employer interference" (*Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 798), the Board believes it necessary to apply these prophylactic rules prohibiting interrogation and surveillance, whether or not the employer found to have engaged in such practices is shown to have been motivated by anti-union animus or has engaged in additional unfair labor practices.

Heretofore, the Board's power to prohibit acts of employer interference of this character regardless of the employer's motive and without adducing evidence of the effect of the practice on em-

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[10] The validity of the Board's general observations is borne out on this record, even apart from the allegedly discriminatory discharges, which are not now before the Court. Thus employee Romansky, who had joined the union, felt constrained to respond to her employer's direct interrogation by stating that the union had nothing to offer that the employees did not already have (*supra,* p. 5), and the first question put at the union meeting by an employee already interrogated by Winer, was "Will we get fired if we join the Union?" (*supra,* p. 6, n. 6).

ployees in any particular case, was generally upheld by the courts. Thus, it has been held that "any real surveillance by the employer over the Union activities of employees, whether frankly open or carefully concealed, falls under the prohibitions of the Act." *National Labor Relations Board* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 455 (C. A. 4), and cases cited; see also *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C. A. 2), holding that even a "petty incident" of surveillance violates the Act; cf. *National Labor Relations Board* v. *Eaton Mfg. Co.*, 175 F. 2d 292, 298-299 (C. A. 6), and cases cited. The courts also recognized that because "interrogation of employees concerning their union activities is, of itself, coercive" (*Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C. A. D. C.), certiorari denied, 341 U. S. 914), it has "been uniformly condemned as violation of the Act" (*National Labor Relations Board* v. *Norfolk Southern Bus Corp.*, 159 F. 2d 516, 518 (C. A. 4), certiorari denied, 330 U. S. 844, and cases cited).

Recently, however, some courts, like the court below in the instant case, have rejected the Board's approach, and held that interrogation cannot be condemned as an unfair labor practice in the absence of evidence that the employer was motivated by anti-union considerations or com-

mitted other unfair labor practices.[11] See, *e.g.*, *John S. Barnes Corp.* v. *National Relations Board*, 190 F. 2d 127, 130 (C. A. 7); *Sax* v. *National Labor Relations Board*, 171 F. 2d 769, 772-773 (C. A. 7); *National Labor Relations Board* v. *Hinde & Dauch Paper Co.*, 171 F. 2d 240 (C. A. 4). These courts apparently substitute for the Board's presumption, based upon its extensive observation and cumulative experience, that interrogation and surveillance in all cases tend to jeopardize the security of employees in exercising their statutory rights, their own judgment that unless shown in each case to proceed from evil intent, acts of interrogation and surveillance are innocuous. The Board cannot agree that this approach is adequate or proper to safeguard "the right of employees to organize for mutual aid without employer interference." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 798. The Board's detailed explication in the *Standard-Coosa-Thatcher* case of the factors on which its judgment is based was issued after, and in consequence of, the *Sax* and *Hinde & Dauch* decisions. Nevertheless, although the Board's findings are clearly within the "specialized field of knowledge" in which the Board's judgment carries

[11] Not until the instant case, however, has any court extended the immunization of "isolated interrogation" to encompass a supervisor's repeated interrogation of employees as to their union activities, as to the identity of other employees interested in the union, and as to the matters discussed at a union meeting.

"the authority of an expertness which courts do not possess and therefore must respect" (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 488), they have been repudiated by the court below.

This Court has previously recognized the importance of permitting the Board to bring its experience to bear in the administration of the Act by applying presumptions as to the effect of employer conduct upon the organizational freedom of employees. *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 231; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 798; cf. *National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U. S. 219, 231-232. The Board regards the role of the presumption it applies in these cases as at least equal in importance with the presumption which this Court held it could properly apply in the *Republic Aviation* and *Stowe* cases.

The problem of curtailing acts of interrogation and surveillance is of continuing widespread importance. A large percentage of employer unfair labor practice cases which require formal decision by the Board, 81 out of 246 during the year beginning July 1, 1950, involve acts of interrogation. The Board believes strongly that adherence to its policy of blanket condemnation of surveillance and interrogation is necessary to discourage these practices and thereby to effectuate the policies of the Act. In the interest of successful administration of the statute, the conflict between the Board's

view and that of the court below should be resolved by this Court.

The other reason given by the court below in support of its holding serves only to emphasize both the importance of the case and the court's departure from established principles. The court's suggestion that Supervisor Winkler's activities should not be attributed to the Company because there was no proof that they "resulted from any plan or program of the respondent" and may have been "motivated only by her own curiosity" (R.A. 40) represents a plain departure from the rule established by this Court in *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 519-520; *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 78, and *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 598-599, under which an employer's liability for acts of a responsible supervisor does not depend upon any showing that the supervisor acted pursuant to a "plan or program" of the corporate employer. These cases establish that so long as freedom of employees is interfered with, the employer may not escape responsibility for remedying the interference on the ground that he did not authorize or ratify it.[12] The interference with employee freedom is identical whether the supervisor is subjectively moti-

[12] This principle was reaffirmed by the Congress which enacted the 1947 amendments. Section 2 (2) and (13) of the Act, as amended.

vated by "curiosity" or by anti-union considerations.[13]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

MAY, 1952.

[13] In any event it should be noted that Winkler reported the results of her inquiries either to Winer or, in his absence, to his administrative assistant, who in turn informed Winer (B. A. 51, 96).

APPENDIX A

Excerpts From 85 NLRB 1358

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-C-2077

In the Matter of

STANDARD-COOSA-THATCHER COMPANY

and

TEXTILE WORKERS UNION OF AMERICA, CIO

Decision and Order

* * * * *

1. We agree with the Trial Examiner's findings that the Respondent violated Section 8 (1) of the National Labor Relations Act and Section 8 (a) (1) of the Act, as amended,[2] by the statements of various supervisory employees, including the following instances of interrogation:

a. Second Hand Stacey's questioning German and other section men concerning their attendance at union meetings.

b. Second Hand Stacey's questioning Sain concerning attendance at a union meeting of the section men.[3]

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[2] References hereinafter made to sections of the amended Act refer also, when appropriate, to equivalent sections of the Act prior to amendment, unless the context clearly indicates otherwise.

[3] *Matter of Clover Fork Coal Co.*, 4 N.L.R.B. 202, enfd. 97 F. 2d 331 (C.A. 6).

c. Overseer Brown's questioning Poole, and Second Hand Denson's questioning Gurley concerning their union membership.[4]

d. Second Hand Smith's questioning Parker and Second Hand Crawley's questioning Womack concerning their union sympathies.[5]

e. Second Hand Crawley's questioning Sparks and Johnson concerning their reasons for joining or sympathizing with the union.[6]

f. Second Hand Crawley's questioning Posey and Johnson and Overseer Peden's questioning German concerning their voting intentions.[7]

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[4] *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 518, 520. The General Counsel excepted to the Trial Examiner's failure to find that Second Hand Eugene Denson had interrogated and threatened Gurley, Gann, and Merritt. To the extent that these findings were based upon the Trial Examiner's resolution of the credibility of witnesses who gave conflicting testimony, we will not here overrule them. *Matter of Minnesota Mining & Mfg. Co.*, 81 N.L.R.B. 557. However, the Trial Examiner apparently credited Gurley's testimony that Denson had asked her if she belonged to the Union and that she had replied in the affirmative. Accordingly we find that Denson questioned Gurley as to her union membership.

[5] *N.L.R.B.* v. *A. S. Abell Co.*, 97 F. 2d 951, 955-6 (C.A. 4), cited with approval *Virginia Electric & Power Co., et al.*, v. *N.L.R.B.*, 115 F. 2d 414, 423 (C.A. 4).

[6] *N.L.R.B.* v. *W. A. Jones Foundry & Machinery Co.*, 123 F. 2d 552, 554 (C.A. 7), enfg. 30 N.L.R.B. 809; *Texarkana Bus Co.* v. *N.L.R.B.*, 119 F. 2d 480 (C.A. 8).

[7] *Matter of Anderson Mfg. Co.*, 58 N.L.R.B. 1511.

g. Overseer Brown's questioning Frazier and Second Hand Fisher's questioning Poole and Wood concerning their predictions of the outcome of the pending Board-directed election.[8]

The Respondent contends that the circumstances of this case take these instances of interrogation outside the proscriptions of the Act. We disagree. We again affirm the position the Board has consistently taken that Section 8 (a) (1) of the Act is violated when an employer interrogates his employees concerning any aspect of union activity.[9] The same considerations which require this uniform holding are controlling in this case.

The express purpose of the Act is to protect the "exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their

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[8] Although the Trial Examiner treated these questions as intended to elicit from the questioned employees information concerning their voting intentions, we think them equally vulnerable as attempts to elicit information concerning the strength of the Union. See *Matter of Hagy, Harrington & Marsh*, 74 N.L.R.B. 1455, 1456.

[9] *Matter of Greensboro Lumber Company*, 1 N.L.R.B. 629, 632; *Matter of Sewell Mfg. Co.*, 72 N.L.R.B. 85, enfd. as modified (on other grounds) 172 F. 2d 459 (C.A. 5); *Matter of Ames Spot Welder Co., Inc.*, 75 N.L.R.B. 352, footnote 6; *Matter of Wytheville Knitting Mills, Inc.*, 78 N.L.R.B. 640, enfd. as modified (on other grounds) 175 F. 2d 238 (C.A. 3); *Matter of Minnesota Mining & Mfg. Co.*, 81 N.L.R.B. 557.

employment or other mutual aid or protection."[10] Consonant with this objective, Section 7 of the Act declares that employees have the "right" to engage in organization and association, and Section 8 (a) (1) makes it an unfair labor practice for employers to "interfere with, restrain, or coerce" employees in the exercise of that right.

The language and the legislative history of Section 8 (a) (1) show that Congress intended the terms "interfere," "restrain," and "coerce" to have separate and distinct meanings.[11] In banning "interference" Congress clearly meant to proscribe any employer activity which would tend to limit employees in the exercise of their statutory rights.[12] Inherent in the very nature of the

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[10] Section 1 of the Act.

[11] See Senate Committee on Education and Labor, Hearings on S. 1958, 74th Cong., 1st Sess. (1935) pp. 713-714, 558, 305; H. R. No. 245 on H.R. 3020, 80th Cong., 1st Sess. (1947) p. 28.

[12] Looking back after 4 years of experience under the Wagner Act, at a time when amendments to Section 8 (1) were urged but not adopted, one of the major sponsors of the Act, Senator Wagner, made this observation on the need for continuing the prohibition against interference:

> The ban against "interference" has been of central importance in protecting the right to organize . . . since it embraces a multitude of activities which would not be reached by specific prohibitions within the law and would not be included within the range of such narrower concepts as "restraint" or "coercion." 81 Cong. Rec., 76th Cong., 1st Sess. (1939) A. 2053.

rights protected by Section 7 is the concomitant right of privacy in their enjoyment—"full freedom" from employer intermeddling, intrusion, or even knowledge.

Like the Trial Examiner, we believe that interrogation of employees as to union matters constitutes, at the very least, interference with the rights protected by Section 7. Whenever an employer directly or indirectly attempts to secure information concerning the manner in which or the extent to which his employees have chosen to engage in union organization or other concerted activity, he invades an area guaranteed to be exclusively the business and concern of his employees.

This Board, with the approval of the courts, has long recognized this right to privacy in condemning as unlawful interference such indirect attempts by an employer to secure information about the union activities of employees as resort to espionage or surveillance.[13] When espionage is successfully concealed, "restraint" and "coer-

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[13] *N.L.R.B.* v. *Pensylvania Greyhound Lines*, 303 U. S. 261, 270; *N.L.R.B.* v. *Friedman-Harry Marks*, 301 U. S. 58, 73; *N.L.R.B.* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 50 (C. A. 3); *N.L.R.B.* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 455 (C. A. 4); *N.L.R.B.* v. *Atlas Underwear Co.*, 116 F. 2d 1020, 1023 (C. A. 6); *N.L.R.B.* v. *Vincennes Steel Corp.*, 117 F. 2d 169, 172 (C. A. 7); *N.L.R.B.* v. *Grower Shipper Vegetable Ass'n, etc.*, 122 F. 2d 368, 376 (C. A. 9); *N.L.R.B.* v. *Northwestern Mutual Fire Ass'n*, 142 F. 2d 866, 867 (C. A. 9), cert. den. 323 U. S. 726; *N.L.R.B.* v. *Fairmont Creamery Co.*, 143 F. 2d 668, 670 (C. A. 10), cert. den. 323 U. S. 752.

cion" may perhaps be absent, but the conduct is nevertheless vulnerable on the ground of "interference," if on no other.[14] So it is in the case of interogation. The employer may not legally seek information on those subjects which the statute makes the sole concern of his employees.

Interrogation by an employer not only invades the employee's privacy and thus constitutes interference with his enjoyment of the rights guaranteed to him by the Act. Its effect on the questioned employee, like that of open surveillance of union activity,[15] is to "restrain" or to "coerce" the employee in the exercise of those rights. The employee who is interrogated concerning matters which are his sole concern is reasonably led to

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[14] This Board has, however, recognized that secret espionage may amount to more ". . . our experience establishes that employers resort to labor espionage for the purpose of obstructing and destroying self-organization. To be effective it must necessarily be secret; it is nonetheless effective in restraining the employees in the exercise of their rights under the Act on this account." *Matter of Virginia Electric & Power Co.*, 44 N.L.R.B. 404, 427, enfd. 132 F. 2d 390 (C. A. 4), affd. 319 U. S. 533. See LaFollette Reports, 75th Cong. 1st Sess. (1937): *Violations of Free Speech and Rights of Labor*, Sen. Rep. 46, Pt. 1, p. 3, and *Report on Industrial Espionage*, id., Pt. 3, pp. 27, 29.

[15] For example, *Matter of Baldwin Locomotive Works*, 20 N.L.R.B., 1100, 1122 enfd. 128 F. 2d 39 (C. A. 3); *Bethlehem Steel Co.* v. *N.L.R.B.*, 120 F. 2d 641, 646 (App. D.C.), enfg. 14 N.L.R.B. 539; *Montgomery Ward & Co.* v. *N.L.R.B.*, 115 F. 2d 700, 703 (C. A. 8) enfg. 17 N.L.R.B. 191; *Bethlehem Shipbuilding Corp.* v. *N.L.R.B.*, 114 F. 2d 930, 937 (C. A. 1), approved in *N.L.R.B.* v. *Donnelly Garment Co., et al.*, 330 U. S. 219, 231.

believe that his employer not only wants information on the nature and extent of his union interests and activities but also contemplates some form of reprisal once the information is obtained. The finger which espionage might merely direct to him is actually pointed at him by the inquiry from his employer. He fears that a refusal to answer or a truthful answer may cost him his job.[16] He is also in effect warned that any contemplated union activity must be abandoned, or he will risk loss of his job. Weighing these "subtle imponderables," the Board early characterized direct interrogation as "a particularly flagrant form of intimidation of individual employees."[17] The Board assumed the violation "obvious."[18] Many courts

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[16] ". . . because of the widespread feeling that all employers hate unions, the employee does not expect his admission of union activity or membership to be used as a basis for promoting him or voluntarily giving him a raise." *R. D. Morgan, Employer's Freedom of Speech and the Wagner Act* (1946) 20 Tulane Law Rev. 469, 499. The U. S. Bureau of Labor, after extensive investigation and interviewing of workmen, found " '. . . an almost universal fear that any attempt at union organization or group action by employees would be immediately known to management officials, and would result in the discharge of the leaders and participants of the movement.' " S. Rep. No. 151, 77th Cong., 1st Sess., *Labor Policies of Employers' Associations,* Pt. IV: "The 'Little Steel' Strike and Citizens' Committees" (1941) pp. 40-41.

[17] First Anual Report of the National Labor Relations Board (1936) 76.

[18] *Matter of Greensboro Lumber Co.,* 1 N.L.R.B. 629, 632; *Matter of Harrisburg Children's Dress Co.,* 2 N.L.R.B. 1058, 1063, 1069, and others.

did likewise.[19] As the Board said, in *Matter of Indianapolis Power & Light Co.*:[20]

> . . . attempts to elicit information of this character . . . necessarily would intimate, restrain and coerce [employees] in the exercise of their rights to organize. Such interrogation constitutes a threat that the Employer's economic power and superior position may be used to the disadvantage of the individual employees disclosed to be members of or active in the union.

And in *Matter of Botany Worsted Mills*:[21]

> Its effect is to create immediate, personal fear of loss of employment in present and prospective members of the Union, and it obviously constitutes, therefore, flagrant and unlawful interference, restraint, and coercion of employees.

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[19] For example, *H. J. Heinz Co.* v. *N.L.R.B.* 311 U. S. 514, 518, 520; *N.L.R.B.* v. *Botany Worsted Mills, Inc.*, 106 F. 2d 263, 267 (C. A. 3); *N.L.R.B.* v. *Norfolk Southern Bus Corp.*, 159 F. 2d 516, 518 (C. A. 4), cert. den. 330 U. S. 844; *N.L.R.B.* v. *Harris-Woodson Co., Inc.*, 162 F. 2d 97, 100 (C. A. 4); *N.L.R.B.* v. *Brown Paper Mill Co.*, 133 F. 2d 988, 989 (C. A. 5); *N.L.R.B.* v. *National Plastic Products Co.*, 175 F. 2d 755 (C. A. 4), 23 L.R.R.M. 2312, enfg. 78 N.L.R.B. 699.

[20] 25 N.L.R.B. 193, at 204-205, enfd. as modified (on other grounds) 122 F. 2d 757, 760 (C. A. 7), cert. den. 315 U. S. 804.

[21] 4 N.L.R.B. 292, at 297-298, enfd. as modified (on other grounds) 106 F. 2d 263, 267 (C. A. 3).

Our experience demonstrates that the fear of subsequent discrimination which interrogation instills in the minds of employees is reasonable and well-founded. The cases in which interrogated employees have been discharged or otherwise discriminated against on the basis of information obtained through interrogation are numerous.[22] These cases demonstrate conclusively that, by and large, employers who engage in this practice are not motivated by idle curiosity, but rather by a desire to rid themselves of union adherents. In prohibiting interrogation, therefore, we are not only preserving the employees' right to privacy in their union affairs; we are not only removing a subtle but effective psychological restraint on employees' concerted activities; but we are also seeking to prevent the commission of the further unfair labor practice of discrimination by condemning one of the first steps leading to such discrimination.

The Respondent contends, however, that when, as here, employees openly profess their union sympathy by wearing union buttons, they have

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[22] See for example, *Matter of Ford Brothers*, 73 N.L.R.B. 49, and *Matter of Texas Miller Products, Inc.*, 83 N.L.R.B. 616. In the latter case an employee who had been discharged complained to a management representative that other union adherents had not been discharged. She was asked the names of these others, and gave them. They were discharged the next morning on a wholly unsupported pretext of incompetence.

demonstrated that they have no fear of disclosing their union sympathies and affiliation and may therefore properly be interrogated on union matters. This argument loses sight of the essential character of the restraint involved. The subtle pressure created by interrogation results from the realization by the interrogated employee that his employer is *concerned* with his union affiliation or activities and will, therefore, act to the employee's detriment. The restraint and coercion are in no way dissipated because the employee knows that, by observing the union button, the employer, if he cared to, might have obtained some information without direct interrogation.[23] In any event, the scope of the Respondent's inquiries went beyond the fact of union membership and into the realm of other matters not voluntarily disclosed by the display of union buttons.

Finally, we again reject the contention that interrogation is protected by Section 8 (c) of the

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[23] As the Supreme Court observed in *N.L.R.B.* v. *Link Belt Co.*, 311 U. S. 584, at 588: "It is indeed a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer creates or for which he is fairly responsible and as a result of which it may reasonably be inferred that the employees did not have the complete and unfettered freedom of choice which the Act contemplates." See also *N.L.R.B.* v. *Ford Brothers*, 170 F. 2d 735 (C. A. 6) enfg. 73 N.L.R.B. 49, *supra*.

amended Act.[24] Interrogation cannot be considered an expression of "views, arguments, or opinion," within the meaning of that provision. Moreover, the purpose of that section is to permit an employer to express his views, not to license him to extract those of his employees. The employer is explicitly accorded a right to "influence" his employees by verbal appeals to reason, but not to fear.[25]

* * * * *

APPENDIX B

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. Supp. IV, Secs. 141, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

* * * * *

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[24] *Matter of Ames Spot Welder Co., Inc.*, 75 N.L.R.B. 352, footnote 6; *Matter of Wytheville Knitting Mills, Inc.*, 78 N.L.R.B. 640, enfd. as modified (on other grounds) 175 F. 2d 238 (C. A. 3), 24 L.R.R.M. 2108; *Matter of Minnesota Mining & Mfg. Co.*, 81 N.L.R.B. 557; *Matter of U. S. Trailer Mfg. Co.*, 82 N.L.R.B. 112, and others.

[25] Compare 81 Cong. Rec., 74th Cong., 1st Sess. (1935) 9689.

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair

labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 791

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ARTHUR WINER, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of the Court of Appeals (R.A. 36-44)[1] is reported at 194 F. 2d 370. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B.A. 15-33, 42-48) are reported at 94 NLRB 651.

[1] The printed record before this Court consists of two separately paginated volumes: the Appendix to the Board's brief in the court below, herein designated "B.A.", and the Appendix to Respondent's brief in the court below, herein designated "R.A." Reference to the petition for enforcement, the opinion of the Court of Appeals in full and judgment denying enforcement of the Board's order are bound with, and immediately follow, said Appendix to Respondent's brief, and are paginated continuously therefrom. Respondent's Appendix, as referred to herein, includes said reference to said petition, opinion and judgment.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 26, 1952 (R.A. 46). The jurisdiction of this Court is invoked under the Act of June 25, 1948, 62 Stat. 928, 28 U.S.C. § 1254 (1), and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED.

Petitioner has predicated its "Questions Presented" upon a factual statement (Petition 2), unsupported by reference to the record, which does not accurately reflect the evidence adduced. Respondent discusses this statement *infra* at pages 3-6.

The questions presented are:

1. Whether the Board could properly hold that alleged[2] acts of interrogation and surveillance constituted interference, restraint, or coercion in violation of the right of employees "to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. Whether the Board could properly attribute the acts of the supervisor, who was in charge of the employees in question, to the corporate employer.[3]

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[2] Except for substitution of "alleged" for "these", Respondent believes it unnecessary to take issue with the precise wording of Petitioner's "Questions Presented" (Petition 3).

[3] With regard to Petition 3, footnote 2, the discharge of Helen Little presents only the routine inquiry as to whether substantial evidence supported Petitioner's finding of discrimination. The Court of Appeals found no such support, expressly holding (R.A.

STATUTES INVOLVED.

Petitioner has reprinted (Petition 28-31) certain provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. IV § 141 *et seq.*). Additional provisions of that Act and pertinent provisions of the Administrative Procedure Act, as amended (60 Stat. 237, 5 U.S.C. § 1001 *et seq.*), are set forth in Appendix A to this Brief, *infra*, page 15.

STATEMENT.

The Court of Appeals described the background of the case at bar as follows (R.A. 39):

> "In the instant case . . . a small plant with less than one hundred employees is involved. The trial examiner found that during the period in question 'union discussions among the employees became quite prevalent in the plant.' It is also apparent that the employees talked freely before and with the supervisor, Winkler, and with the company president, Winer."

As he had done "over a period of years" (R.A. 2; see also R.A. 3), Respondent's president called three employees to his office on a day during the latter part of July

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44) that "Little did have a great deal of trouble with the machine she was using in her work; that her troubles with the machine caused machine failures which entailed costly repairs; and that the other employees did not have similar troubles with their machines. Moreover, Little herself told her friends that she was discharged because of machine trouble, and told the Indiana compensation authorities that she was laid off because of lack of work."

The quality of the reasoning upon which Petitioner relied to sustain its discrimination finding is sufficiently indicated in the opinion of the court below at R.A. 43.

"Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 491 (1951).

the first part of August, 1949. Eva Van Meter, one of these employees, testified that "since we had moved out to the new building something was wrong, our work wasn't coming out as fast as it used to be. I know I fell way down" (R.A. 76). "Well, there wasn't any of us doing as much as we had been in the other place. I knew something was wrong. If the rest of the girls failed, I knew it wasn't me. So, we discussed that, and he had the machine moved so there would be work closer to each one of the top pressers" (R.A. 14). Winer stated: "'If I understand it, you are trying to organize a union. If that is what the girls want, that is what they can have'" (R.A. 13; see also R.A. 14, 15).

The court below found (R.A. 37):

> "There was no testimony indicating that Winer asked any of the girls he interviewed whether or not they or any other employees belonged to the union or had engaged in any union activities. Van Meter testified positively that Winer did not ask her such questions. The third girl did not remember his asking anything about dissatisfaction or any similar matter."

Respondent's sewing room supervisor, Winkler, had been employed in that capacity for three years before the hearing, and had previously been a sewing machine operator for Respondent (R.A. 17). She had sewed as an operator with some of the girls whom she supervised at the time of the hearing (R.A. 17), and she and the girls in her department on occasion discussed "Just anything that happens to come up", including church, fishing, sewing, cooking (R.A. 18)—and these discussions started either by Winkler's approaching the girls or by their approaching her (R.A. 18).

Although Winkler never approached employee Anne Kusmierz on the subject of union activity (B.A. 97), Kusmierz used to approach Winkler and Assistant Supervisor

Kovacick at the lunch hour and start discussions about the union (B.A. 98, 101, 102). Thus she asked Winkler whether she (Kusmierz) "should bring in a leaflet" (B.A. 98). Kusmierz admitted that in August, 1949, she came up to Winkler and "told her I heard from a few girls that the union lady was going around, and I said, 'I know she wasn't by my house.' I said, 'Maybe she will be there. I don't know'" (B.A. 70). The Board's counsel asked Kusmierz, "Did you offer that yourself?" Her answer was, "Yes, I did" (B.A. 70). Kusmierz conceded that on the day of the union meeting she took her notice of the meeting to Winkler (B.A. 71):

> "A. . . . at lunch hour, *I went up to Anne's desk.*
>
> "Q. Anne whom?
>
> "A. Anne Winkler. *I showed her my letter.* She looked at it and then gave it back to me. Nothing was said after that. *I asked her,* 'Well, I don't know what to do, if I should go to the meeting or shouldn't go.' *I told her* that I didn't know what to do.
>
> "She said, 'Well, you are your own boss. It is up to you. If you want to, you can go and find out what it is all about.'" (Emphasis added.)

And Winkler explained to Kusmierz: ". . . you want to hear their side of it just as well as—I know I would" (R.A. 18).[4] The Court of Appeals held (R.A. 40): "So far as the record shows, Winkler was motivated only by her own curiosity on the subject of the union, a subject in which all were interested and about which all of the employees were talking."

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[4] Petitioner states (Petition 5): ". . . Winkler, . . . in Winer's absence, reported the information she obtained to Winer's administrative assistant." B.A. 59, 96, 97, 107-111 and R.A. 17-18 are cited in support of that statement. Of this list of references, only one—B.A. 96—is relevant. This contains the assistant's testimony that Winkler "told me that some of the girls had *come to her* and *told her* that they had received letters to attend a meeting, or something to that effect." (Emphasis added.)

In addition, the court below specifically ruled:

(a) that the Board had *not* found that "there was any statement derogatory of the union made by the Respondent or by anyone speaking for it" (R.A. 38);

(b) that the Board had *not* found that Respondent "made any threats against employees in reference to union membership or activity" (R.A. 38-39); and

(c) that the Board had *not* found that Respondent "promised any benefits except as to vacations and as to that finding . . . there was no reasonable basis for it in the evidence" (R.A. 39).

REASONS FOR DENYING THE WRIT.

I.

Drawing upon its own "presumption" and "expertise", Petitioner obscures the pettiness of the facts into which the court below refused to read a violation of the Act. That refusal to "presume" a violation is another in the long line of decisions disapproving Petitioner's doctrinaire determinations in the face of a statute commanding decision upon the evidence. It is more than that. It is a decision meticulously faithful to the standards of review laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488, 490 (1951).

The central fact in the case at bar is that for more than four years before the occurrences in issue, a union had attempted to organize Respondent's employees, and yet Petitioner alleged only the brief and cryptic Winer and Winkler incidents to sustain its finding that Section 8(a)(1) of the Act had been violated. Such violation must be found, Petitioner told the court below, despite the fact that Respondent made no derogatory statements about the union, despite the fact that Respondent made no threats or promises, despite Winer's assurances that if the girls wanted a union that was what they could have, and despite Winkler's statements that the girls were "their own boss" and should hear the union side of it. Citing only cases involving long and persistent anti-union campaigns, Petitioner failed to convince the court below that this case involved any violation—failed to convince the court below that on the entire record the court could conscientiously sustain the Board.

Petitioner's main proposition appears to be that this Court ought to grant certiorari to prevent a tendency of courts to "substitute for the Board's *presumption* . . . that interrogation and surveillance in all cases tend to jeopardize the security of employees in exercising their statutory rights, their [the courts'] own *judgment* that unless shown in each case to proceed from evil intent, acts of interrogation and surveillance are innocuous" (Petition 14; emphasis added).

In considering the 1947 amendments to the National Labor Relations Act, the House conferees, in agreeing to the present language of Section 10(e) requiring proof "by substantial evidence on the record considered as a whole," reported to the House[5]:

> "The language [of Section 10 (e)] . . . *precludes the substitution of expertness for evidence* in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to *preclude such decisions as those in . . . the . . . Republic Aviation . . . case. . . .*" (Emphasis added.)

The same report also stated[6]:

> "The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony —that is to say, on the weight of the credible evidence. Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet that test otherwise."

It is significant that Petitioner, in its argument in the court below, did not rely on presumption or expertise. Its argument there against the application of *Sax* v. *National*

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[5] H. R. Rep. No. 510, 80th Cong. 1st Sess. 56 (1947).
[6] Ibid., p. 54.

Labor Relations Board, 171 F. 2d 769 (C.A. 7th, 1948) was not that presumption should be substituted for evidence, but that in the instant case the *evidence* established a course of conduct on the part of Respondent which was intended to thwart or destroy union activities.

Indeed, Petitioner, even in its own decisions, has not stood four-square behind its principle that interrogation is unlawful *per se*. On the same day the Board decided *Standard-Coosa-Thatcher Company*, 85 NLRB 1358 (1949) (reprinted, in part, at Petition 18-31, as Petitioner's confession of faith on the subject), the Board also decided *West Texas Utilities Company, Inc.*, 85 NLRB 1396 (1949). In the latter case, it reversed the Trial Examiner's finding of a violation of Section 8(a) (1) on the very ground that there was only "isolated" interrogation! In *Boston and Lockport Block Company*, 98 NLRB No. 114 (1952), the Board again held that isolated interrogation did not call for a finding that Section 8(a) (1) had been violated.

Petitioner cites (Petition 13) *National Labor Relations Board* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 455 (C.C.A. 4th, 1944) as holding that "any real surveillance by the employer over the Union activities of employees" violates the Act. But the facts in *Collins & Aikman* show surveillance "for several hours," "almost nightly", over a three-week period, at a drug store where unionizing activity took place—and which was frequented by the employer's agents only during the unionizing period. Such facts are hardly comparable to the incidents in issue here, without either history or pattern of anti-union activity, and without threat, promise or disparagement, real or implied.

In *National Labor Relations Board* v. *Clark Bros. Co., Inc.*, 163 F. 2d 373, 376 (C.C.A. 2nd, 1947) (Petition 13), the court found "an aggressive anti-union campaign."

Petitioner's quotation (Petition 13) from *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 743

(C.A.D.C., 1950), cert. den. 341 U.S. 914, similarly relied on by Petitioner, deals only with a narrow approval of limited questioning by employers' counsel in defending against unfair labor practice complaints.

It should be particularly noted that Petitioner's abbreviated quotation (Petition 13) from *National Labor Relations Board* v. *Norfolk Southern Bus Corp.*, 159 F. 2d 516, 518 (C.C.A. 4th, 1946), cert. den. 330 U.S. 844, is as follows:

> "... it [interrogation of employees concerning their union activities ... of itself] has 'been uniformly condemned as violation of the Act....'"

But what the court actually said was:

> "Questioning of employees concerning union membership and activities *and disparaging remarks* by supervisory employees *made in such way as to hamper the exercise of free choice on the part of the employees*, have been uniformly condemned as violation of the Act." (Emphasis added.)

Far from accepting Petitioner's view that talk on union matters is to be considered in a vacuum, the courts have refused to accept Petitioner's double standard that where anti-union background can be proved, it is decisive in finding a violation of Section 8 (a) (1) of the Act, and where anti-union background cannot be proved, presumption is enough. Representative cases are: *National Labor Relations Board* v. *Mathieson Alkali Works, Inc.*, 114 F. 2d 796, 799, 802 (C.C.A. 4th, 1940); *Quaker State Oil Refining Corporation* v. *National Labor Relations Board*, 119 F. 2d 631, 632, 633 (C.C.A. 3rd, 1941); *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. 2d 423, 434-35 (C.C.A. 10th, 1944); *National Labor Relations Board* v. *West Ohio Gas Co.*, 172 F. 2d 685, 687-88 (C.A. 6th, 1949); *Ohio Associated Tel. Co.* v. *National Labor Relations Board*, 192 F. 2d 664, 668 (C.A. 6th, 1951).

Petitioner relies (Petition 15) on *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (1949) and *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (1945), and refers to *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219 (1947) for the proposition that this Court sanctions administration of the Act by presumption. But in the *Stowe Spinning Co.* case, what this Court actually said was:

> "*In the background of discrimination* found by the Board in this case, we cannot say that its conclusion should be upset." (336 U.S., at 230; emphasis added.)
>
> "We cannot say that the Board was wrong as a matter of law *in view of the setting.*" (336 U.S., at 231-32; emphasis added.)

In the *Donnelly Garment Co.* case, neither the pages cited by Petitioner (231-32) nor any other part of the opinion deal, even by indirection, with the Board's presumptions.

As for the *Republic Aviation* case, it was expressly dealt with in H. R. Rep. No. 510, 80th Cong. 1st Sess. 56 (1947), quoted, in part, *supra*, page 8, and quoted and discussed by this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 485-86 (1951).

As this Court made clear in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941), employer expressions on union matters must be viewed in their full setting. And whatever doubts may have remained were effectively laid to rest by this Court's pronouncements in the *Universal Camera* and *Pittsburgh Steamship* cases. It is now beyond cavil that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including

the body of evidence opposed to the Board's view." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488 (1951). Where, as here, the decision of the court below depends upon appreciation of the total circumstances, there is no warrant for Petitioner's urging this Court to depart from its usual rule of non-interference with decisions of the Courts of Appeals. *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 340 U.S. 498, 503 (1951).

II.

Petitioner also questions (Petition 3) "whether the Board could properly attribute the acts of the supervisor, who was in charge of the employees in question, to the corporate employer."

In *International Association of Machinists* v. *National Labor Relations Board,* 311 U.S. 72, 80 (1940) (Petition 16), this Court made it clear that the issue of employer responsibility for supervisors' acts depended on whether the employees would have just cause, under the circumstances, to believe that the supervisors were acting for management.

In *H. J. Heinz Company* v. *National Labor Relations Board,* 311 U.S. 514, 518, 521 (1941) (Petition 16), not only did the employer admit that at least four foremen and its general superintendent actively disparaged the union and threatened the employees with discharge, but the employer took no step to disavow any of these activities or proclaim its neutrality.

In *National Labor Relations Board* v. *Link-Belt Company,* 311 U.S. 584, 599 (1941) (Petition 16), this Court

not only stressed the employer's failure to announce its impartiality, but stated:

> "If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere."

The routine and repeated decisions of the courts answering Petitioner's second question in the negative, under circumstances such as the present, are adequately reflected in these two excerpts:

> ". . . it seems to us pertinent to note that there has come to our attention no case involving acts of supervisory officials in which a court has enforced or affirmed a cease and desist order of the Board except cases in which there was either a record of hostility toward the outside union, or else evidence of discriminatory discharges or of active solicitation by supervisors, or some other pointed indication of the employer's anti-union sentiment." *National Labor Relations Board* v. *Brown Co.*, 160 F. 2d 449, 456 (C.C.A. 1st, 1947).

> "Whether acts of supervisory employees constitute restraints upon union activity on the part of a company must be viewed, to a large extent, against the background of the company's attitude, policy, and practice in the past with regard to such matters. . . . Before inquiries as to union membership and statements by employers or supervisory employees can be held to be unfair labor practices, they must be shown to have some relation to the coercion or restraint of the employees in their right of self organization. . . . The undisputed testimony of all witnesses, both for the Board and for the respondent, shows that neither the supervisory employees nor the respondent expressed any views that contained threats of reprisal or force or promise of benefits which would have tended to restrain, coerce, or intimidate the employees in the exercise of their right to organize and bargain col-

lectively. . . ." *National Labor Relations Board* v. *Tennessee Coach Co.*, 191 F. 2d 546, 554, 555-56 (C.A. 6th, 1951).

CONCLUSION.

The instant proceeding is another attempt by Petitioner to mark out for itself a restricted area in the administration of the National Labor Relations Act—off limits to any reviewing court.

This Court rejected the same attempt in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951). The case at bar neither requires nor warrants a reiteration of the principles stated in that case.

We accordingly request that the Petition be denied.

Respectfully submitted,

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APPENDIX A

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. IV, § 141 *et seq.*), in addition to those quoted by Petitioner at pages 28-31 of its Petition, are as follows:

> Sec. 10(c): ". . . If *upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (Emphasis added.)

The Administrative Procedure Act, as amended (60 Stat. 237, 5 U.S.C. § 1001 *et seq.*), provides, in part:

> Sec. 1006: "In hearings which section . . . 1004 of this title requires to be conducted pursuant to this section . . . no sanction shall be imposed or rule or order be issued *except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.*" (Emphasis added.)